

12
In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No. 524

MILLER LAND AND LIVESTOCK Co.,
Petitioner and Appellant below,
VS.

FRANK BOGART,
Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.**

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Office - Supreme Court, U. S.

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NOV 12 1942

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*To the Honorable Harlan Fiske Stone, Chief Justice of
the United States, and to the Associate Justices
of the Supreme Court of the United States:*

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

1. In a proceeding under Section 75 a to r of the National Bankruptcy Act, Miller Land and Livestock

Co., a farming corporation, petitioned and cross-petitioned the District Court, pursuant to Subdivision k of that Act, for a reduction of the rate of interest on a \$150,000.00 claim secured by several first real estate mortgages on land worth \$800,000.00. The issues arise on the pleadings.

2. Summarized, the allegations of the Debtor petitions and cross-petitions (Pages 54 to 57, Paragraphs 6, 7, 8, 9 and 10, and Pages 62 to 65, Inclusive, of the Transcript of Record), show that these proceedings started April 13, 1938. (Pages 52 and 53, Paragraph 2, Transcript of Record.) That at the time this part of the controversy arose the Debtor was engaged in negotiating settlements with its secured creditors, including Abbott Co., *and that all of said creditors, except Frank Bogart, had waived claims for interest and had discounted the face of their claims in various amounts.* (Page 55, Paragraph 6 of Transcript of Record.)

3. The petitions show that to increase the productivity and earnings of the land so that Debtor might sooner pay its creditors, that it had (Page 62, Paragraph III) since the proceeding started, increased the value of the mortgaged security held by Mr. Bogart in excess of \$100,000.00. Such improvements consisted of "constructing and repairing ditches, fences, building and storage facilities, roads, bridges, corrals and other improvements". (Paragraph 8, Page 55 of Transcript of Record.) That Debtor at that time was paying various and numerous secured claims. Such settlements and payments were beneficial to the Debtor and particularly to its unsecured creditors. (Paragraph 6,

Page 54 of Transcript of Record.) (\$200,000.00 of unsecured claims, Paragraph IV, Page 64 of Transcript of Record.) That due to such payments, including payments to Mr. Bogart, the amount of cash on hand was reduced. (Paragraph 6 above referred to.) In general it appears from the record that it was very desirable and necessary if Debtor was to be rehabilitated and the interests of the unsecured creditors protected, that money presently be used for increasing productivity and income. By so doing it would prevent forced and disastrous liquidation. That otherwise, one creditor, Mr. Bogart, would probably get the bulk of the assets worth \$800,000.00 for his then claim of \$180,000.00, and the unsecured claims, totaling \$200,000.00 would get little or nothing. (Paragraphs III and IV, Pages 63 and 64, and Paragraphs V and VI, Page 68, Transcript of Record.)

4. That "Frank Bogart has not been and is not acting in good faith toward petitioner (the debtor and appellant herein) and other creditors, in that his actions demonstrate he would rather have the security he claims than the money due him. That by acquiring the security (admitted to be worth \$800,000.00) he would make a large unearned and unjust profit at the expense of the debtor and the unsecured creditors, and that in an effort to bring about such a result he has maintained and contemplates maintaining a series of vexatious, harassing and unfounded objections, petitions, motions and proceedings whereby he hinders debtor from refinancing, takes the time of its management and causes unnecessary expense to the debtor." (See Paragraph VI, Page 68 of Transcript of Record.)

5. That "considering the value of the security, the amount of the investment, the money market and all circumstances surrounding Mr. Bogart's claim, including the best interest of all concerned, it is just, equitable and right that the Court should modify the proposal and reduce the interest rate, etc." (Page 69, Paragraph VIII of Transcript of Record.)
6. Mr. Bogart, the appellee below, the respondent here, responding to the petition and cross-petition, objected upon the sole grounds (Page 73 of the Transcript of Record):
 - "1. That said petition does not state facts sufficient to warrant granting such relief.
 - "2. That the Court is without authority, power or jurisdiction to grant such relief."
7. No testimony was introduced, as no denial of the allegations was made and the allegations of the Debtor were and are to be taken as true.
8. On August 16, 1941, the District Judge ordered the interest rate reduced from 6% to 4%. (Page 74 of Transcript of Record.)
9. Mr. Bogart appealed to the Circuit Court, giving as his statement of points relied upon that:
 - "1. That the Court was without jurisdiction to reduce the rate of interest on the Bogart claim to four per cent, as it appears that the value of the property mortgaged as security for the payment of the claim is largely in excess of the indebtedness.

"2. That the petition for the reduction of the rate of interest does not state facts sufficient to authorize such reduction."

10. On July 21, 1942, the Ninth Circuit Court of Appeals by a two to one opinion reversed the order involved. The opinion is cited as *Bogart v. Miller Land and Livestock Co.*, 129 F. (2d) 772.

11. The opinion seemingly being based upon the grounds that the order of the District Court resulted in discrimination against Mr. Bogart in the matter of interest, the Debtor filed a petition for rehearing on the grounds that such issue had not been pled nor argued nor was involved, that the record on such issue was not before the Court. That what record there was on that point refuted it. Debtor also made application to have the record on the question of discrimination brought up alleging facts and the existence of a record below showing that if discrimination regarding interest rate was involved that such discrimination existed in favor of Mr. Bogart because he had received, and under the Court order would continue to receive a greater rate of interest than any other creditor. See petition for rehearing filed in Circuit Court.

12. The Ninth Circuit Court of Appeals on September 14, 1942, denied the petition for rehearing and in so doing made no mention of the application of Debtor for completing the record on the question of discrimination, which word appeared for the first time in the opinion of the Circuit Court.

13. The amount involved in this proceeding is approximately \$12,000.00. Since the order the Debtor

has made payments according to its proposal, and about July 1, 1942, the Debtor, having been aided by having been relieved by the order of the District Court, at least temporarily, from a part of its financial burdens, paid Mr. Bogart everything he claimed, except the difference in interest of 2%. The main proceeding is at this time still pending. In refinancing the Farm Debtor, Mr. Bogart and the First Security Bank of Utah, N. A. of Ogden, Utah, about July 1, 1942, entered into an agreement whereby Mr. Bogart released his mortgages upon being paid the undisputed balance with interest according to the Court order, and he accepted the obligation of the bank up to \$12,000.00 in place of his mortgages, payment being conditional upon it being finally determined that he is legally entitled to the 2% difference in interest here involved.

14. To inform the Court it is also a fact that Debtor, since the order of the District Court was made, submitted a new proposal to its remaining creditors which was confirmed and has been carried out except as to one or two disputed claims involving relatively small amounts still in litigation. The modified proposal did not affect Mr. Bogart's claim, as it proposed to pay him whatever was found to be due him when this controversy is decided.

15. The statements in Paragraphs 13 and 14 do not appear in the record that was before the Ninth Circuit Court of Appeals and are alleged for the purpose of informing this Court in a general way of the present status of the main proceedings out of which this controversy arises. On September 15, 1942, pur-

suant to petition of Debtor the Circuit Court stayed the issuance of its mandate until November 1, 1942, and if a petition for a writ of certiorari be filed within that time with the Clerk of the Supreme Court a further stay until such petition was disposed of.

II.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The writ should issue, because as appears by the Petition the Circuit Court of Appeals has:

1. Decided on important questions of general law in a way probably untenable, to-wit, held that District Court in a Farm Debtor proceeding has no power to reduce the interest rate on a secured claim.

2. Decided an important question of federal law which has not been, but should be, settled by this Court, to-wit, held that an order reducing interest rate on one claim was discrimination and outside the jurisdiction of the Court to make.

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, to-wit, decided this cause on an issue (discrimination) which was not raised by pleadings, nor briefed, nor covered by the record; assumed that discrimination existed and that on petition for rehearing showing that if discrimination existed it was in favor of and not against the claimant,

refused to permit the record to be completed to show such record fact.

4. Has held both ways on identical question. See *Cohen v. Elder*, 112 F. (2d) 967.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit requiring said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Court had in the case numbered and entitled on its docket, No. 9946, Frank Bogart, appellant, v. Miller Land and Livestock Company, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other relief as to this Court may deem proper.

Dated this 6th day of November, 1942.

C. T. BUSH, JR.,

C. LIEBERT CRUM,

Counsel for Petitioner.

